IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

RICHARD B,

Plaintiff,

Civil Action No.
3:19-CV-0053 (DEP)

ANDREW M. SAUL, Commissioner of Social Security,[1]

Defendant.

APPEARANCES:

OF COUNSEL:

FOR PLAINTIFF

LACHMAN, GORTON LAW FIRM
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PETER A. GORTON, ESQ.

FOR DEFENDANT

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Special Assistant U.S. Attorney

DAVID E. PEEBLES
U.S. MAGISTRATE JUDGE

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[1] Plaintiff's complaint named Nancy A. Berryhill, in her capacity as the Acting Commissioner of Social Security, as the defendant. On June 4, 2019, Andrew M. Saul took office as Social Security Commissioner. He has therefore been substituted as the named defendant in this matter pursuant to Rule 25(d)(1) of the Federal Rules of Civil Procedure, and no further action is required in order to effectuate this change. *See* 42 U.S.C. § 405(g).

ORDER

Currently pending before the court in this action, in which plaintiff seeks judicial review of an adverse administrative determination by the Commissioner of Social Security, pursuant to 42 U.S.C. §§ 405(g) and 1383(c)(3), are cross-motions for judgment on the pleadings.[2] Oral argument was heard in connection with those motions on March 11, 2020, during a telephone conference conducted on the record. At the close of argument I issued a bench decision in which, after applying the requisite deferential review standard, I found that the Commissioner's determination resulted from the application of proper legal principles and is supported by substantial evidence, providing further detail regarding my reasoning and addressing the specific issues raised by the plaintiff in this appeal.

After due deliberation, and based upon the court's oral bench decision, which has been transcribed, is attached to this order, and is incorporated herein by reference, it is hereby

ORDERED, as follows:

[2] This matter, which is before me on consent of the parties pursuant to 28 U.S.C. § 636(c), has been treated in accordance with the procedures set forth in General Order No. 18. Under that General Order once issue has been joined, an action such as this is considered procedurally, as if cross-motions for judgment on the pleadings had been filed pursuant to Rule 12(c) of the Federal Rules of Civil Procedure.

1) Defendant's motion for judgment on the pleadings is GRANTED.

2) The Commissioner's determination that the plaintiff was not disabled at the relevant times, and thus is not entitled to benefits under the Social Security Act, is AFFIRMED.

3) The clerk is respectfully directed to enter judgment, based upon this determination, DISMISSING plaintiff's complaint in its entirety.

David E. Peebles
U.S. Magistrate Judge

Dated: March 13, 2020
Syracuse, NY

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

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RICHARD B.,

Plaintiff,

vs. 3:19-CV-53

ANDREW M. SAUL,
Commissioner of Social Security,

Defendant.

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DECISION - March 11, 2020

James Hanley Federal Building, Syracuse, New York

HONORABLE DAVID E. PEEBLES

United States Magistrate Judge, Presiding

APPEARANCES (by telephone)

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THE COURT: All right. Thank you both for excellent presentations.

Plaintiff has commenced this proceeding under 42, United States Code, Section 405(g) and 1383(c)(3) to challenge a determination by the Commissioner of Social Security denying plaintiff's application for benefits. The background is as follows.

The plaintiff was born in July of 1976; is 43 years of age. He was 38 years old at the time of his application on April 28, 2015. Plaintiff is 5-foot, 11-inches in height and weighs approximately between 190 and 200 pounds.

Plaintiff lives in Binghamton, New York, in a house with his ex-girlfriend and a dog, as well as a son, who was 19 years old at the time of the hearing in this matter on February 14, 2018.

Plaintiff achieved a GED. While he was in school he attended regular classes. He also has one semester of college education. Plaintiff is right-handed. He has a driver's license. Plaintiff has no significant work history. He stopped work in December of 2006. In 2005 he was doing apartment and real estate maintenance. In 2005 and 2006 he was an installation tech and a plumber's helper in an HVAC and plumbing situation.

Physically plaintiff suffers from several conditions that have been diagnosed, some or all of which

have been attributed to a snowboard accident in 2000. He suffers from chronic pain syndrome, fibromyalgia, right shoulder pain, left thigh pain, left leg iliotibial band syndrome, cervical radiculopathy, cervicalgia, lower back pain and migraines. He has treated with Dr. Keith Nichols, LCSW Barry Schecter one to two times a month, and Dr. Paul Dura, a rheumatologist.

Mentally plaintiff has had issues most of his life. He had several periods of hospitalization as a youth and he was sexually abused as a child. He suffers from major depressive disorder, post-traumatic stress disorder, rule out intermittent explosive disorder, bipolar disorder, generalized anxiety disorder, paranoia, history of poly-substance abuse and cannabis use. He claims to have been drug free since 2012. He is still being drug tested. He has been prescribed over time several medications, including Carvedilol, Flexeril, Naratripline, Seroquel, Suboxone, Topamax, Clonopin, Amitriptyline, and he has tried Gabapentin.

The plaintiff is a smoker. He smokes approximately four cigarettes per day. He occasionally uses marijuana and alcohol. Plaintiff was convicted in 2004 of drug possession and received two years of probation as a sentence.

In terms of activities of daily living, plaintiff does some cooking, cleaning, laundry. He does not shop. He

does watch television, listen to the radio. He does some child care. He plays video games. And he likes as a hobby blowing glass.

The background is as follows. Plaintiff initially applied for and was denied benefits on April 27, 2012 and November 6, 2014. That's at page 84 of the Administrative Transcript. On September 28, 2015 plaintiff applied for Title XVI Supplemental Security Income benefits, alleging an onset date of March 30, 2012. He claimed that he suffers from crushed disc in neck and lower back, depression, anxiety, panic and rage disorder, agoraphobia, pain in the back, pain in the neck, pain in the right arm, numbness in the arms and neck. He stated in support of his application, "I don't go outside or deal with the public, I get very agitated and violent, migraines and insomnia."

A hearing was conducted to address plaintiff's application for benefits on February 14, 2018 by Administrative Law Judge Kenneth Theurer. On March 1, 2018 ALJ Theurer issued an unfavorable decision finding that the plaintiff was not disabled at the relevant times and, therefore, ineligible for benefits. That became a final determination of the Agency on November 29, 2018, when the Social Security Administration Appeals Council denied plaintiff's application for review.

In his decision ALJ Theurer applied the familiar

five-step sequential test for determining disability.

At step one he determined plaintiff had not engaged in substantial gainful activity since the date of his application for benefits, which I misstated. The application actually was April 28, 2015.

At step two he concluded that plaintiff suffers from severe impairments that impose more than minimal limitations on his ability to perform basic work functions, including degenerative disc disease of the lumbar spine, cervical spine disorder, post-traumatic stress disorder, depressive disorder, anxiety disorder, and fibromyalgia.

At step three he concluded that plaintiff's conditions do not meet or medically equal any of the listed presumptively disabling conditions set forth in the Commissioner's regulations, specifically considering listings 1.04, 12.04, 12.06 and 12.15.

ALJ Theurer next determined that plaintiff retains the residual functional capacity to lift and carry 20 pounds, frequently lift and carry 10 pounds, sit for up to six hours, stand or walk for approximately six hours in an eight-hour workday with normal breaks. He included several additional limitations to address both the physical and mental conditions suffered by the plaintiff, which I'll discuss more comprehensively in a moment. Applying that RFC finding, he determined at step four that plaintiff had not engaged in any

significant past relevant work and, therefore, proceeded to step five.

At step five ALJ Theurer concluded that if plaintiff were capable of performing a full range of light work, a finding of no disability would be directed by Medical-Vocational Guideline Rule 202.20. He concluded, however, that because of the additional limitations that eroded the job base on which the grids are predicated, that a vocational expert testimony was required. Based on that testimony, he concluded that plaintiff is capable of performing jobs that are available in the national economy, including, for example, a photocopy machine operator, a sewing machine operator, and an office helper, and, therefore, concluded that plaintiff was not disabled at the relevant times.

As you know, my task is limited and the standard that I apply is exceedingly deferential. I must determine whether correct legal principles were applied and the determination is supported by substantial evidence. Substantial evidence is defined as such evidence as a reasonable mind would find sufficient to support a conclusion. It is, as the Second Circuit noted in *Brault versus Commissioner*, an exceedingly heightened standard, higher than clear error. In *Brault* the Second Circuit noted that a finding of fact by an ALJ can only be rejected if a

reasonable fact-finder must conclude the opposite.

The plaintiff has raised several contentions in support of his challenge to the determination. He does not in his brief challenge the physical components of the residual functional capacity finding, but does very much challenge the mental components and also the on-task and attendance facet of the RFC, the ability to maintain a schedule.

He alleges improper assessment of the limitation on interaction with others and the failure to limit contact with supervisors and co-workers. He challenges the failure to credit uncontradicted opinions regarding workplace and attendance. He challenges the failure of the Administrative Law Judge to consider plaintiff's history of outbursts. And he challenges the weight given to the various opinions, including the fact that most reliance is placed upon non-examining physician Dr. Brown.

In terms of interacting with others, the residual functional capacity does include limitations that address that. At page 21 the Administrative Law Judge notes that plaintiff can relate to and interact with others to the extent necessary to carry out a simple task, but should avoid work requiring more complex interaction or joint effort to achieve a work goal. He should have no more than incidental contact with the public, where incidental is defined as more

than never and less than occasional, and by which is meant the job should not involve any direct interaction with the public but the claimant does not need to be isolated away from the public. There are opinions in the record addressing interaction with others. LCSW Schecter concluded that at page 558 plaintiff's ability to interact appropriately with the general public is extremely limited, his ability to accept instructions and respond appropriately to criticism from supervisors is extremely limited, and his ability to get along with co-workers is extremely limited.

The opinion from the Broome County Social Services person who reviewed determined that plaintiff had non-exertional limitations, including in responding appropriately to supervision and co-workers in work situations. That's at page 372. Dr. Slowik, the examining consultative examiner, at page 357 found that plaintiff's ability to relate adequately with others is moderately to markedly limited. Dr. Brown addressed it at page 84 and determined that relating to others is moderately to markedly limited, but found that plaintiff is capable of a simple job not working closely with others.

The ALJ did, as I just read, limit plaintiff's abilities -- placed a limitation on interaction with supervisors and co-workers, although it's not directly phrased in that way. The cases cited by the plaintiff I find

are distinguishable. I've reviewed them. And, in particular, the case of *Little versus Commissioner of Social Security*, 780 F.Supp.2d 1143 from the District of Oregon, 2011. In that case there was no limitation at all with regard to co-workers and supervisors; the limitation only applied to interaction with the public.

In my view, the limitations contained in the RFC related to interacting with others is supported by Dr. Brown. Dr. Brown is an acceptable medical source whose opinions can constitute substantial evidence. The real difference in this case and many others is that there is no opinion from a treating source who is deemed an acceptable medical source, so Dr. Brown's non-examining opinion is not being elevated over a treating source from an acceptable medical source. The ALJ did account for some of the limitations set forth in Dr. Slowik's opinions. The determination also draws some support from the Broome County Social Security source.

Admittedly, Counselor Schecter had a very different view, but he is not an acceptable medical source, or was not at the time, and it is for the ALJ under *Veino* to weigh competing opinions. I note that the bulk of unskilled work deals with things and not people or data, as demonstrated in 20 C.F.R. Part 404, Subpart P, Appendix 2, Section 202.00(g), and Social Security Ruling 85-15. I also note that the Dictionary of Occupational Titles entries for the three jobs

identified show that the interaction required is minimal, that the people rating of each of those three is 8. And I also note that the training and probationary period for all three is SVP II requiring between a short demo and one month training and probation. And in the end it is plaintiff's burden to demonstrate that he is unable to interact at all beyond the limitations set forth in the RFC.

In terms of work pace and attendance, Dr. Slowik indicated a moderate to marked limitation on ability to maintain a regular schedule, at 357. LCSW Schecter indicated plaintiff would be off task more than 33 percent of the time and absent three or more days per month, at 559. Dr. Brown did indicate moderate limitation in the ability to perform activities within a schedule, maintain a regular attendance, be punctual, and the ability to complete a normal workday and workweek without interruption from physical symptoms.

The ALJ rejected Dr. Slowik's opinion and articulated reasons for doing that at pages 26 and 27. He also rejected LCSW Schecter's opinions as not coming from an acceptable medical source and not supported, as well as being speculative. The opinion of Dr. Brown indicates a moderate limitation but states that plaintiff is still able to perform simple work and to maintain a schedule, at page 84. Substantial evidence supports that and ALJ Theurer is proper to rely on the opinions of Dr. Brown. So I find on that

issue that the issue was properly considered and the opinions of Dr. Slowik and LCSW Schecter containing more limiting situations in this regard were properly rejected.

In terms of outbursts, there is no question there is some evidence of anger, mood swings and outbursts, but most of those come during sessions where one expects that emotions are piqued during counseling sessions. There is no showing that it occurred on a sustained basis. It's plaintiff's burden to show that that should have been accounted for in the residual functional capacity, and I find that burden was not carried.

In terms of weighing the medical opinions, Dr. Brown's was clearly given the most weight. His opinion was properly analyzed. I note that ALJ Theurer did go through carefully the history of plaintiff's medical treatment, including his mental health treatment. At pages 24 and 25 noted the waxing and waning, noted many instances where it was referenced that his condition was stable, that he denied symptoms, and that his situation was being handled through the use of medication.

I agree that much of plaintiff's mental health treatment occurred after Dr. Brown rendered his opinion; however, I didn't see any indication in going through the records that plaintiff's condition, which admittedly waxed and waned, was significantly deteriorated after Dr. Brown

rendered his opinion. It is noted that Dr. Brown is a state agency consultant, who by regulation is considered to have program expertise and can be relied on. The reference to Dr. Brown and the reliance on Dr. Brown in my view is supported by substantial evidence. It is the ALJ under *Veino* who has the ability to weigh competing opinions.

I note that *Quinn*, the case relied on by the plaintiff, was a case where -- and I'll get you that citation. *Quinn v. Colvin*, 2016 WL 7013471, from the Middle District of Pennsylvania. The District Judge in that case, District Judge Nealon, relied on Third Circuit precedent. In this case I did not, again, find any significant deterioration in post October 2015 notes. Under *Camille*, it was therefore proper for the ALJ to rely on -- under *Camille versus Colvin*, 652 Fed. Appx. 25, from the Second Circuit 2016, it was proper for the ALJ to rely on Dr. Brown even though there was post opinion treatment. Dr. Brown's opinion was based on Dr. Slowik and other evidence. He had at least one note from Dr. Nichols. He also reviewed plaintiff's activities of daily living. And the bottom line is plaintiff has been unable to show that no reasonable fact-finder would have reached the same conclusion as the Administrative Law Judge when considering Dr. Brown's opinions.

As I indicated previously, LCSW Schecter's opinion was rejected by the ALJ as lacking in support from treatment

notes. There were, as the ALJ noted, few abnormal status findings, no testing or complete mental status exam was given, and his opinions concerning attendance and absenteeism were speculative.

So, in conclusion, I find that the reliance on Dr. Brown's opinions is supported by substantial evidence and supports the residual functional capacity, which, in turn, therefore, is supported by substantial evidence.

At step five the Commissioner carried his burden by posing a hypothetical to a vocational expert which was based on the residual functional capacity finding, and with the vocational expert's testimony, the Commissioner carried his burden of establishing the existence of work that plaintiff is able to perform in the national economy.

So, I will grant judgment on the pleadings to the defendant and dismiss plaintiff's complaint.

Again, thank you both for excellent presentations. I hope you have a good day.

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C E R T I F I C A T I O N

I, EILEEN MCDONOUGH, RPR, CRR, Federal Official Realtime Court Reporter, in and for the United States District Court for the Northern District of New York, do hereby certify that pursuant to Section 753, Title 28, United States Code, that the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Eileen McDonough

EILEEN MCDONOUGH, RPR, CRR
Federal Official Court Reporter